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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964.

**No. 516**

BANK BUILDING AND EQUIPMENT CORPORATION OF AMERICA, A CORPORATION,

*Petitioner,*

*vs.*

WALTER J. REES,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE SMITHCRAFT-WARREN PRINTING COMPANY, CHICAGO

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*To the Honorable Earl Warren, Chief Justice, and the Associate Justices of the Supreme Court of the United States:*

Your petitioner respectfully shows:

Petitioner prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

### THE OPINIONS BELOW.

The opinions of the United States Court of Appeals for the Seventh Circuit, in the cause therein numbered 14231, have been reported and appear at 332 F. 2d 548. The

majority opinion written by Judge Castle, and the dissenting opinion of Judge Schnackenberg are appended hereto in the Appendix, *post*.

## GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) The judgment of the United States Court of Appeals for the Seventh Circuit in this cause was entered on the 25th day of May, 1964, with Judges Duffy and Castle concurring in the opinion affirming the judgment entered for plaintiff below, and Judge Schnackenberg dissenting therefrom.

(ii) A timely petition for rehearing was duly filed by petitioner herein.

(iii) On June 24, 1964, the United States Court of Appeals for the Seventh Circuit entered an order denying such petition for rehearing, but Judge Schnackenberg voted to grant such petition for rehearing, the judgment of the United States Court of Appeals for the Seventh Circuit thus becoming final on June 24, 1964.

The jurisdiction of this court is invoked under U. S. Code, Title 28, Section 1254, providing for a review of decisions of the United States Court of Appeals.

## QUESTIONS PRESENTED.

The questions raised by this petition are:

(A) Whether the decision, rendered by a divided court, allowing recovery to respondent, plainly forbidden by the express terms of a written contract, is in conflict with the decision of the United States Court of Appeals, Eighth Circuit, involving similar issues, decided under Missouri law (which, by stipulation, governs this case, Appendix, p. v), and whether such conflict should be settled by this Court;

(B) Whether the United States Court of Appeals erred in rendering an opinion as to rights under a contract, concededly governed by Missouri law, which opinion is patently contrary to the applicable Missouri law;

(C) Whether the majority decision of the United States Court of Appeals, by ignoring the patently applicable provisions of a written contract, has, in effect, deprived petitioner of its property without due process of law, in direct contravention of the Fifth Amendment to the Constitution of the United States;

(D) Whether the decision of the United States Court of Appeals, in writing a new contract for the parties, has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision.

## CONSTITUTIONAL PROVISION INVOLVED.

The Fifth Amendment to the Constitution of the United States, the pertinent part of which reads:

> "* * * nor shall any person * * * be deprived of * * * property, without due process of law;"

## STATEMENT OF THE CASE.

Respondent Walter J. Rees (*sic*: "Rees") filed an action at law in the District Court of the United States, Northern District of Illinois, Eastern Division, against petitioner Bank Building and Equipment Corporation of America (*sic*: "Bank Building"), seeking to recover commissions allegedly due to him under the terms of a written employment contract, for no fixed period, duly entered into between Bank Building, as Employer, and Rees, as Employee. The principal defense raised by petitioner was that the express terms of the written contract governed the payment of

commissions on termination of employment, and that Rees was paid the full amount due to him according to such contract terms. Rees, in support of his claim, on one hand embraced the contract as governing the amounts of his commissions allegedly due, but, on the other hand, disavowed the provisions of the same contract which expressly confined commissions to those earned prior to termination of employment.

The case was tried before a jury, which returned a verdict in respondent Rees' favor and assessed damages against petitioner in the amount of Thirty Nine Thousand Dollars ($39,000.00), upon which verdict judgment was entered.

Upon petitioner's appeal to the United States Court of Appeals for the Seventh Circuit, the judgment of the trial court was affirmed by a divided court. Judge Castle spoke for the majority. Particular attention is directed to the dissenting opinion written by Judge Schnackenberg, who was emphatically of the opinion that the trial court and the majority opinion, on the appeal, had, in effect, ignored the plain limiting terms of the contract upon which respondent's claim was predicated, thereby making a new and different contract for the parties and obliterating the governing provisions of the contract sued upon, which limited the right to commissions upon termination of employment to those only on work authorized or contracts secured prior thereto.

Simply stated, our position is that Judge Schnackenberg was right, and that Judges Castle and Duffy were wrong.

**The Material Facts.**

Bank Building engages in the business of furnishing architectural and consulting services, acting as general contractor and acting as supplier of fixtures and equipment in connection with the construction or remodeling of facilities

of banks and other financial institutions. It maintains a large staff consisting of executives, sales analysts or salesmen, architects, designers, cost estimators, decorators and others. (A. 103.)

In its arrangement with its clients, for architectural services only, a client became obligated to pay Bank Building the fee for such architectural services in three successive and conditional stages: 25% of the total when preliminary plans were approved; the next 50% when working drawings were approved; and the remaining 25% when all final plans were approved. (A. 107, 108.)

Under the employment contract, which was for no fixed duration, entered into between Bank Building as employer and Rees as employee, the salesman's right to commission based on architectural services was correlated with the client's obligation to pay the several portions of the architectural fee due to Bank Building, the employment contract providing that the salesman was entitled to a commission credit on Bank Building's 25% fee when the client approved the preliminary plans; a commission credit on the next 50% of Bank Building's fee, when working plans were approved; and a commission credit on the final 25% of Bank Building's fees when the client approved the final plans. (A. 147-149).

A salesman was entitled to commission credit on construction and fixture contracts procured by him, when any such contract was actually signed by Bank Building's client.

The employment contract anticipated the termination of a salesman's employment, and specifically set forth the terms governing the payment of commissions applicable upon any such termination of employment, the contract providing (A. 8):

> "Should the employee leave the company voluntarily, or at the request of the company, final accounting and

settlement shall be made within 30 days after such separation. The employee shall be paid in full the commission or other compensation due him in accordance with the terms of this agreement for those portions of work *authorized* at the time of separation as follows:

> Commissions on Building and Fixture Contracts at established rates on the original contract and Fixture Extras *secured* up to the time of separation.
>
> Commissions on Architectural contracts at established rates on the actual or estimated fee to be paid by the owner upon completion of the *authorized stage* of work. (Preliminary, Working Drawing or Final.) *No compensation is to be paid on the unauthorized portion of architectural work.*" (Emphasis supplied.)

To be effective as a salesman for Bank Building, such salesman had to be familiar with banking operations, bookkeeping, means of serving the public, and all of the facilities which banks ordinarily render to their customers. Such salesman had to understand banking terminology, and be able to persuade a banker that Bank Building understood and would be able to solve the bank's problems. Such salesman had to have the ability to convey intelligently the client's problems to Bank Building, and, in turn, to convey intelligently Bank Building's recommendations and plans to the client. (A. 153, 154.)

Prior to his employment by Bank Building in 1956, Rees, who was then 55 years old, had no background or business experience in any of these specific fields, Rees having spent the previous 20 years in a succession of relatively short periods in various jobs, all of which were unrelated to Bank Building's unique type of business. (A. 272-274.) At the time of his employment by Bank Building, Rees was informed he would have to participate in a training program. (A. 153-154.)

Under the employment contract, Rees was given a draw-

ing account of $208.00 per month, to be credited against commissions actually earned; to earn the drawing account, Rees was required to secure annually a $200,000 minimum quota of sales, for one or another of Bank Building's various services. (A. 7, 9.)

Rees was employed by Bank Building on February 28, 1956. In a comparison, made October 31, 1956, of all of Bank Building's salesmen, Rees ranked 15th out of 18 salesmen, having procured only $4,250 worth of contracts on which Bank Building was authorized to proceed or was entitled to payment, compared with a total of more than $17,000,000 procured by all the salesmen. Even one year later, in a similar comparison, October 31, 1957, Rees still ranked 15th out of 16 salesmen, having to his credit only $17,000 worth of such contracts, compared with a total of more than $20,000,000. (Pltf. Ex. 19-a, 19-b.)

By mid-1958, Rees had been removed from a job which he was servicing (Kankakee Federal Savings and Loan Association), the customer becoming dissatisfied with Rees' unfamiliarity with the work involved. (A. 170, 252.)

Rees, having failed to meet his minimum quota, was more than $8,000 "in the red" as of June 1958. (A. 288.) At that time, J. B. Gander, Bank Building's president, wanted Rees discharged. Klein, Bank Building's vice president and director of sales, and Fisher, sales manager for the Chicago area, proposed an arrangement whereby Rees could still be retained, but on a basis whereby Rees would receive commissions at only 50% of the scheduled percentages. Rees accepted such proposed reduction, but the arrangement, lacking approval of president Gander, was never consummated. Accordingly, Rees' services were terminated as of August 15, 1958. (A. 224, 225, 265.)

After an exchange of communications in 1959 whereby Rees claimed "several thousand dollars were still due him,"

and in which Bank Building, through its counsel, advised Rees that his commission account was, in fact, overdrawn approximately $2,500.00 (Pltf. Ex. 16, 17), Rees filed his complaint in the case below.

In said action, Rees sought to recover $75,000 for commissions allegedly due to him, as of August 15, 1958, when his employment was severed, such allegedly due commissions arising out of transactions with two clients, Bell Savings and Loan Association (*sic:* Bell), in Chicago, and American National Bank of St. Paul, Minnesota (*sic:* American). Neither of these clients were customers of Rees, nor were they originally solicited by him. Bell had merely asked Bank Building to send over a representative to answer inquiries. American was already a satisfied customer of Bank Building.

**The Bell Transactions.**

Bell was interested in remodeling space in the building where it was located in Chicago. The testimony and the documentary evidence at the trial disclosed that Rees' duties were largely confined to conveying information back and forth between Bell and Bank Building. Bank Building's Miner was called in to supervise the account, and the negotiations and details were largely handled by Miner and Fisher.

Halleen, Bell's senior vice president, testified (A. 333) that Rees "was there in body but that was about it." Extensive consultation, preparation of preliminary plans and revisions thereof followed, but no preliminary plan was ever approved by Bell until February or March, 1959, some six or seven months after Rees' employment had been terminated. (A. 202, 283, 284, 351.) Moreover, until Bell's final approval of preliminary plans, Bell had the privilege of cancelling the whole arrangement upon an agreed "buy out" figure of $5,000. (A. 352.)

Although Rees was given full commission credit on the preliminary architectural work, at the first 25% stage, nevertheless, by his action below, he sought commission upon further stages of the work and other contracts, which were not authorized or entered into until long after the termination of his employment. Such claims were expressly excluded by the employment contract.

**The American Transactions.**

With respect to American, Rees, making contact with such former client of Bank Building in July, 1956, found American interested in building a new drive-in bank facility. In August, 1956, American signed an architectural-consultant agreement with Bank Building, covering only the drive-in facility. (Pltf. Ex. 77, 78.) Several months later, American considered building a new two-story bank building. In November, 1956, American signed a new architectural-consultant agreement, combining the proposed new two-story bank building and the drive-in facility. (Pltf. Ex. 79, 80.) At this stage of the project, Klein, Bank Building's vice president from St. Louis, was assigned to the American job, and after studying the client's problem, decided it would be more expedient to remodel the building (Bremer Building) in which American was then located, rather than build a new two-story building. Thereupon, in February 1957, Klein initiated estimates for remodeling the Bremer Building. (Pltf. Ex. 55. 56.) Months of discussion and consideration followed between American and Bank Building; ultimately American decided to abandon the proposed new two-story bank building and to confine its further consideration to the remodeling of the Bremer Building, and the drive-in facility.

Between July 7 and August 15, 1958, the revised plans for the drive-in facility were approved by American, and on August 20 American employed Bank Building to act as general contractor for the drive-in facility only. Although

discussions and a succession of revised plans for remodeling of the Bremer Building continued, it was not until April 29, 1959 (7 months after the termination of Rees' employment) that American approved even the preliminary plans for the remodeling of the Bremer Building. About May 6, 1959, American and Bank Building entered into a series of contracts covering all stages of the remodeling job, including the architectural work, building, and interior fixtures. However, as of August 15, 1958, when Rees' employment was terminated, no preliminary plans had yet been approved by American for the remodeling of the Bremer Building; no working drawings had been authorized or prepared; American had not indicated that it was ready or willing to authorize working drawings or to sign a construction contract for the remodeling of the Bremer Building; nor had American indicated that it was ready or willing to enter into an interior fixtures contract with Bank Building. The status of all of these aspects of the transaction were conceded by Rees at the trial (A. 287).

Rees, upon termination of employment, was given full commission credit covering the architectural and building contracts on the drive-in facility, and also covering the preliminary architectural work (25% stage) for remodeling the Bremer Building. Notwithstanding that no contracts, with respect to the remodeling of the Bremer Building were entered into or even authorized by American until May 1959, Rees, by his action here, claimed full commission credit on the balance of the architectural work, as well as on the full building and fixture contracts, even though such work was not authorized and such contracts were not secured until May 1959.

**Contentions Below.**

Rees predicated his action upon the written employment contract, claiming percentages of Bank Building fees on the schedules contained in such contract. Despite the express provision of the contract governing the payment of commissions on termination of employment, Rees urged that the contract be so interpreted as to give him the benefit of commissions on any contracts ultimately entered into by Bank Building, even though long after his employment was terminated, on the theory that he played some productive part in the ultimate consummation of such contracts, claiming (A. 4) that Bank Building "well knew that the execution of said contracts was imminent" and that Rees would thereby become entitled to substantial commissions. In his complaint (A. 4), Rees claimed that Bank Building "without cause and in bad faith terminated plaintiff's contract of employment in a fraudulent and wrongful attempt to deprive him of the commissions which would accrue to him upon the execution of the above contracts and to unjustly obtain the benefits of plaintiff's services without compensation therefor."

Notwithstanding the allegations of his complaint, Rees, at the trial, espoused a different theory, abandoning his claim as alleged in the complaint, that such contracts (American and Bell) were "imminent"; claiming at trial that he was entitled to benefits of such belatedly consummated contracts because such contracts were "reasonably certain" to be obtained within a reasonable time after his discharge.

Bank Building, both in the trial court and the Court of Appeals, consistently contended that the employment contract, being for no fixed term, was terminable at the will of either party, with or without cause, and that upon such termination, Rees' right to commissions was governed

by the express terms of the employment contract, and not otherwise.

The trial court, accepting Rees' contentions, erroneously ignored the terms of the contract and instructed the jury, in terms of Rees' newly espoused theory at the trial, that Rees was entitled to the disputed commissions if the Bell and American contracts "were reasonably certain to be obtained within a reasonable time" after Rees' employment was terminated.

## BASIS FOR FEDERAL JURISDICTION.

The basis for federal jurisdiction in the District Court was diversity of citizenship and requisite jurisdictional amount.

## ARGUMENT.

### I.

### THE MAJORITY OPINION HERE OF THE UNITED STATES COURT OF APPEALS, FOR THE SEVENTH CIRCUIT, STANDS IN PATENT CONFLICT WITH SPENCER v. GENERAL ELECTRIC COMPANY, 243 F. 2D 934, A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

This case is marked by considerations of widespread public and business importance, which far overshadow the private economic interest of the litigants.

The United States Court of Appeals, by its decision below, has announced a doctrine which injects grave uncertainty into all contracts whereby an employer hires a salesman who is to be compensated by commissions. It has decided an important question of Missouri law in a way in conflict with the applicable law of that state. The decision below, in effect, says that, despite a written contract to the contrary, an employer cannot terminate the services of an unsatisfactory salesman, except at the peril of having to pay commissions on all unfinished business with respect to which the employee-salesman has had any contact. This decision affects countless similar situations constituting the fabric of the nation's most common selling method.

In the employment contract involved here, the employer, by written contract, established the terms and conditions under which salesmen, such as respondent Rees here, would be engaged. Respondent Rees has never contended that anything in the written contract was illegal, improper, or that the employer, by the contract, "overreached" the

employee. The contract of employment *was for no fixed period,* thus becoming an employment terminable at the will of either party under Missouri law. Under the contract involved here, the employee-salesman could quit at any time he chose, and for any reason. Similarly, the employer could terminate the employment at any time, with or without cause. Such mutual flexibility is not to be condemned, and, indeed, is essential and desirable in many situations.

The employment contract, anticipating termination at will, by either party, expressly set forth the basis governing the payment of commissions upon termination of the employment relationship. In this regard, the contract was specific. The salesman was entitled to commissions on all building and fixture contracts which he procured during his tenure, *which were actually signed by the client prior to termination of employment.* The salesman was also entitled to commission on architectural work *actually authorized prior to termination of employment.* However, the contract expressed the specific limitation that the salesman would not be entitled to commission credit on any architectural work which had not been authorized by the client prior to the date employment was terminated. With respect to any unauthorized architectural work or building or fixture contracts not signed, the salesman had no right to commissions after employment was terminated.

Respondent Rees did not claim that the contract was unfair or improper. He stood on the ground that notwithstanding the plain provisions of the contract, the employer had no right to terminate his employment at a time when certain contracts (with Bell and American) were "reasonably certain to be entered into within a reasonable time", claiming that his employer (petitioner here) wrongfully terminated his employment with intent to deprive him of commissions which he would otherwise have earned.

Both the District Court and the reviewing court below accepted respondent's contention, and, in so doing, both courts ignored the applicable Missouri law with respect to employment contracts for no fixed period, where the employer is permitted to terminate the employment with or without cause and for any reason; both courts below failed to recognize that such termination of an employment at will precludes the employee from claiming that his employment was fraudulently terminated, and precludes him from recovering commissions on transactions still unauthorized or unapproved on the severance date.

It was conceded below, and recognized by the reviewing Court, that Rees' right of recovery, if any, was to be determined by Missouri law (Appendix, p. v).

Petitioner's right to terminate respondent's employment under a contract for no fixed period of time, was governed by *Culver* v. *Kurn*, 354 Mo. 1158, 193 S. W. 2d 602, where the Missouri Supreme Court said (p. 603):

> "* * * According to decisions of the Appellate Courts of this State, *a contract of employment without term may be terminated at the will of either party without cause.* * * *" (Emphasis supplied.)

This general rule (56 C. J. S. 412, *Master and Servant*, Section 31) has long been settled in Missouri. (*Davis* v. *Pioneer Life Insurance Company*, 181 Mo. App. 353, 172 S. W. 67, 68; *Brookfield* v. *Drury College*, 139 Mo. App. 339, 123 S. W. 86; *Forsyth* v. *Board of Trustees of Park College*, 240 Mo. App. 677, 212 S. W. 2d 82, 85.) Under such authority, petitioner had the right to terminate respondent's employment *even if there was no "cause"*.

That such severance could be effected at the employer's will, without vesting the employee with a right to recover future earnings or even to claim a wrongful discharge, is equally clear from the Missouri decisions cited above.

In *Davis* v. *Pioneer Life Insurance Company*, 181 Mo. App. 353, 172 S. W. 67, the court said (p. 68):

> "The rule is well settled that an indefinite hiring is a 'hiring at will' and may be terminated by either party at any time, and *if terminated by the employer no action will lie as for a wrongful discharge of the employe. Brookfield* v. *Drury College*, 139 Mo. App. loc. cit. 365, 123 S. W. 86, and cases cited. * * *" (Emphasis supplied.)

*Spencer* v. *General Electric Company*, 243 F. 2d 934 (C. of A. 8th) postured the employer and employee in essentially the identical situation in which petitioner and respondent stand here, under a written employment contract for a one year period which provided, in material part, that if the salesman's employment was terminated, upon such severance, his commissions were to be limited to sales consummated by shipment or delivery prior to termination. The salesman there contended, in essence, that notwithstanding the provisions of the contract, he was still entitled to the ultimate "fruits" of orders procured by him, but which did not "ripen" until after his employment was terminated. The United States Court of Appeals for the Eighth Circuit, confronted with a question similar in all material respects to the question presented in the case here, answered such question under Missouri law, holding that the salesman's commissions were cut off by the terms of his written contract, and, therefore, he was not entitled to recovery for commissions on orders secured prior to termination where shipment occurred after termination.

The facts and legal issues involved in the *Spencer* case in all material respects were similar to those presented by Rees' claim here. In resolving such similar facts and legal issues in this case in favor of plaintiff, the Court of Appeals here, in the majority opinion, reached a result

directly opposite to that reached by the Court of Appeals for the Eighth Circuit in the *Spencer* case.

The attempt of the majority to distinguish the *Spencer* case (Appendix, pp. v-vi) on the ground that the contract there involved contained an express provision authorizing a discharge without cause is ineffectual and contrary to the well-settled Missouri law above discussed. As above pointed out, the contract in *Spencer* was not indeterminate, but was a contract for a definite term. It was, therefore, not terminable at will or without cause, and required an express provision for termination with or without cause. In the present case, the contract, being indeterminate, required no express provision to permit termination at will and without cause, because such provisions were inherent parts of such indeterminate contract under the Missouri law. The contract in *Spencer* and the contract in the present case therefore stand on equal terms insofar as each could be terminated by the employer without cause. Accordingly, the decision of the majority in the present case is opposed to and in conflict with the decision in *Spencer*.

It should be further observed that the majority opinion here of the Court of Appeals, Seventh Circuit, placed some reliance upon *Beebe* v. *Columbia Axle Co.*, 233 Mo. App. 212, 117 S. W. 2d 624 and *Glover* v. *Henderson*, 120 Mo. 367, 25 S. W. 175 (Appendix, p. vi). In the *Spencer* decision, the United States Court of Appeals, Eighth Circuit, recognized that the issues there presented did not fall within the teachings of the *Beebe* or *Glover* opinions, the court there saying, 243 F. 2d 934, 939:

> "It should be observed further that the facts of the situation also leave it outside the rule enunciated in *Glover* v. *Henderson*, 120 Mo. 367, 25 S. W. 175, 177, and *Beebe* v. *Columbia Axle Co.*, 233 Mo. App. 212, 117 S. W. 2d 624, 629 * * *."

By its majority opinion below, the United States Court of Appeals for the Seventh Circuit, in ruling on this same basic question, has rendered a decision which stands in direct conflict with the eminently well reasoned decision of the United States Court of Appeals, for the Eighth Circuit, in the *Spencer* case. It is unseemly that such patent conflict between the United States Court of Appeals for different districts, each purporting to follow Missouri law, should stand unresolved.

## II.

**IN THE CASE BELOW, BY AGREEMENT RECOGNIZED BY THE COURT, RESPONDENT'S RIGHT OF RECOVERY, IF ANY, WAS TO BE DETERMINED IN ACCORDANCE WITH MISSOURI LAW. IN THE MAJORITY OPINION BELOW, THE COURT OF APPEALS, IN GRANTING RESPONDENT RECOVERY, HAS DECIDED THIS IMPORTANT QUESTION IN CONFLICT WITH THE APPLICABLE MISSOURI STATE LAW.**

As a separate ground, and a ground which has frequently been regarded by this Court as cogent reason for granting certiorari, it is to be observed that in rendering the majority decision below, the United States Court of Appeals, for the Seventh Circuit, standing in open conflict with the decision of the United States Court of Appeals for the Eighth Circuit in the *Spencer* case, has refused to follow the governing substantive law of the State of Missouri.

It was agreed below that respondent Rees' right of recovery, if any, was to be measured in terms of Missouri substantive law (Appendix, p. v).

We have consistently contended, and renew our contention here, that respondent Rees was not entitled to recover any amounts of commission upon sales which were actually consummated after his employment was terminated. Such

result was inescapable under the substantive law of Missouri, as announced in *Culver* v. *Kurn*, 354 Mo. 1158, 193 S. W. 2d 602; *Davis* v. *Pioneer Life Insurance Company*, 181 Mo. App. 353, 172 S. W. 67; *Brookfield* v. *Drury College*, 139 Mo. App. 339, 123 S. W. 86; *Forsyth* v. *Board of Trustees of Park College*, 240 Mo. App. 677, 212 S. W. 2d 82; *Spencer* v. *General Electric Company*, 243 F. 2d 934 (C. of A. 8th); *Croskey* v. *Kroger Co.*, 259 S. W. 2d 408 (Kans. City Court of Appeals); *Terre Haute Brewing Company* v. *Dugan*, 102 F. 2d 425 (C. of A. 8th).

If the reviewing court below attempted to follow Missouri law by applying the principles announced in *Beebe* v. *Columbia Axle Co.*, 233 Mo. App. 212, 117 S. W. 2d 624, and *Glover* v. *Henderson*, 120 Mo. 367, 25 S. W. 175 (Appendix, p. vi), it was again in manifest error. Both the *Beebe* and *Glover* cases involved the patently distinguishable relationship between a company and a sales agency, the latter acting as an independent contractor, and not as a "servant." In the case here, we have only the basic *Master and Servant* relationship where a company hired an individual salesman as it would any other employee. The *Beebe* and *Glover* decisions, with which we have no quarrel, held that if a principal permits a sales agency to spend money and incur indebtedness, in an effort to advance the business of its principal, a subsequent termination of the relationship by the principal, without good cause, vests the sales agency with an equitable right to be reimbursed by its principal for the monies expended by the sales agency in advancing the principal's business. This is merely judicial recognition of a doctrine cognizant in the law of Principal and Agent, to the effect that there is an equitable implied obligation on the part of the Principal to make his Agent whole. The principle has no application to the law of *Master and Servant*, and, as noted under Point I, it was rejected by the Eighth Circuit in the *Spencer* case.

Neither the *Beebe* nor *Glover* cases stand as Missouri authority holding that an employee-salesman, whose employment may be terminated at will, has any right to commission on contracts which do not ripen until after his employment is terminated. In the case here, respondent's rights, if any, had to be measured in terms of the specific commission cut-off provisions found in the written contract.

The majority opinion of the reviewing court below not only mistakenly applied the principles of the *Beebe* and *Glover* cases, but also (Appendix, p. vi) relied upon *Fargo Glass and Paint Co.* v. *Globe-American Corporation*, 161 F. 2d 811, a decision of the United States Court of Appeals for the Seventh Circuit (another case dealing with the Principal and Agent relationship) which treated with a doctrine loosely described as "fair dealing." Again, the majority of the reviewing court here was in error. The issues here, revolving about a written contract, left no room for equitable considerations of "fair dealing"; *the issues necessarily had to be resolved in light of the express terms of the written employment contract above.* The magnitude of the error of the majority of the reviewing court below, in attempting to apply the teachings of the *Fargo Glass* case, is manifest, for this very same court (Seventh Circuit) decided in such earlier case that the principal was entitled to cancel the agency relationship *without regard to any liability thereunder for profits which might have been earned subsequent to the cancellation.* In such earlier case, the United States Court of Appeals, for the Seventh Circuit, said (161 F. 2d 811, 813):

> "The defendant says it may cancel the contract with impunity. We agree that it may as to any liability for said contract subsequent to the date of cancellation. * * *"

It is of great significance, however, and adverse to respondent's case, that the *Fargo Glass* case relied upon

*Terre Haute Brewing Company* v. *Dugan*, 102 F. 2d 425, another decision of the United States Court of Appeals for the Eighth Circuit, *also decided under Missouri law.* The *Terre Haute* case, like the *Beebe* and *Glover* cases, involved a sales agency relationship, terminated by the principal. The sales agent sought to recover *both* for the expenses incurred in connection with the agency prior to the termination, and for loss of anticipated profits which would have accrued had the relationship continued. *The United States Court of Appeals, for the Eighth Circuit, held that the sales agent could not recover anticipated profits for the period following the termination.*

The concept of "fair play" has no place in, and must be regarded as a spurious concept in the controversy here, which necessarily must be resolved in light of the specific terms of the written contract upon which respondent Rees has predicated his action.

In the majority opinion below, the reviewing court also wholly disregarded Missouri law as expressed in *Croskey* v. *Kroger Co.*, 259 S.W. 2d 408, a decision of the Kansas City Court of Appeals. The *Croskey* case dealt with an employed salesman, similar in status to respondent Rees here. In that case the salesman urged, as does respondent Rees here, that the termination of his employment, almost immediately prior to the date upon which he would have been entitled to certain bonus compensation, was sufficient to constitute prima facie proof, requiring submission to the jury, of his contention that he had been wrongfully and arbitrarily discharged.

In the case here, respondent Rees' evidence showed that the work and contracts, upon which he sought recovery, were not actually consummated by the authorization or signing by the clients until many months after his employ-

ment was terminated. In the *Croskey* case, the reviewing court said (p. 414):

> "• • • *It is clear that there was no evidence supporting the claim of plaintiff in his petition that defendant discharged him for the sole purpose of depriving him of the amount of bonus that would have been payable to him had he served until the end of 1948.* The fact that he was not discharged until November 13, 1948, does not of itself warrant the conclusion that his employment was terminated without sufficient cause. *After considering all of the evidence favorable to plaintiff, we conclude that plaintiff failed to make a submissible case. The judgment should be reversed.*" (Emphasis supplied.)

The views expressed in the *Croskey* case constituted Missouri substantive law applicable here. Such views were controlling. Notwithstanding, the majority opinion of the reviewing court below totally rejected Missouri law. Indeed, the whole record below was devoid of any evidence offered on behalf of respondent Rees tending to show that his employment was terminated by petitioner for any reason other than respondent's unsatisfactory performance. The majority opinion of the reviewing court below, in affirming the judgment entered by the District Court, and in failing to recognize that petitioner's motions for directed verdict and for judgment notwithstanding the verdict should have been granted, was manifestly improper for many reasons, but particularly because of the reviewing court's failure to recognize and follow the applicable Missouri law.

Such patent failure stands as a further persuasive reason why the majority decision of the United States Court of Appeals for the Seventh Circuit should be reviewed by this Court.

## III.

**IN THE MAJORITY DECISION BELOW, THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT, BY ERRONEOUSLY WRITING A NEW CONTRACT FOR THE PARTIES HAS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS IN DEPRIVING PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.**

In our discussions above, we have pointed out that in the action by respondent Rees, predicated upon a written contract, the matter had to be resolved in terms of such written contract and not otherwise. However, the reviewing court below, while giving lip service to the familiar rule that it had no power to remake or alter the contract of the parties (Appendix, p. v), nevertheless proceeded to do just that. Indeed, this is precisely the ground upon which Mr. Justice Schnackenberg dissented from the majority opinion, when he said (Appendix, p. vii):

> "* * * the district court, by a process of interpretation, in effect extended the contractual rights of plaintiff in such a manner as to obliterate the importance of the prerequisite of authorization."

Moreover, the majority opinion below reflects a gross misapprehension of the undisputed evidence. The terms of the contract were in evidence, and were not disputed. Nevertheless, in the majority opinion, the reviewing court below said (Appendix, p. v):

> "* * * Although the contract language evinces a meeting of the mind of the parties as to the commissions to be paid or credited in the event plaintiff voluntarily left the employ of the company or was discharged for cause it can hardly be assumed from the language employed that a bad faith discharge, without cause, and for the purpose of depriving plaintiff of commissions

> reasonably certain to accrue to him, was within the mutual contemplation of the parties."

In adopting this view, the court arbitrarily closed its eyes to the governing Missouri law, which holds that an employment contract, for no fixed period, permits the employer to terminate the relationship *at any time and without cause.* Therefore, it was unnecessary that the contract specifically cover a discharge "without cause". As pointed out, Point I, *ante*, the well settled Missouri law (that such a contract could be terminated with or without cause, without subjecting the employer to the payment of compensation which might otherwise accrue to the employee) was an inherent and integral term of the contract sued upon.

Therefore, in actual fact, the majority opinion below has altered the written contract and has added a provision which it felt was "equitable". The *effect of adding to the written contract a provision of importance which was not in the contract, and granting recovery upon such new provision, has operated to deprive petitioner of its property without due process of law,* all in patent contravention of the solemn guarantees provided by the Fifth Amendment to the Constitution of the United States.

That a court, under the guise of interpretation, has no right or power to alter or add to the provisions of a written contract is so well settled as to make the citation of authorities unnecessary. However, attention is called to Missouri law which, of course, follows this fundamental judicial concept. In *Forsyth* v. *Board of Trustees of Park College,* 240 Mo. App. 677, 212 S. W. 2d 82, the court said (p. 85):

> "It is not the function of the court to make contracts between parties, but to apply them and construe them as made by the parties themselves. Under the evidence and the pleadings and the law applicable herein, we are not authorized to read into the contract of employ-

> ment between the parties here a provision * * * which the parties themselves did not see fit to stipulate.
>
> "The defendant's (employer) motion for a directed verdict should have been sustained. * * *" (Parenthetical explanation supplied.)

To like effect: *Monterosso* v. *St. Louis Globe-Democrat Publishing Co.* (Mo. Sup. Ct., 1963), 368 S. W. 2d 481, 487; *Mickleberry's Food Products Co.* v. *Haeussermann* (Mo. Sup. Ct. 1952), 247 S. W. 2d 731, 738.

Moreover, in the *Mickleberry* case, the court said (247 S. W. 2d 738):

> "When the language of a contract is plain, there can be no construction because there is nothing to construe. * * * Neither is a contract rendered ambiguous by the fact that the parties do not agree upon the proper construction to be given it. * * *"

The same was true in the case at bar. Rees was bound by his contract. His rights, if any, must be adjudged solely in terms of the express provisions of such contract. There was nothing to "construe" here.

Attention is called to the very recent opinion of the Appellate Court, 1st District, of Illinois in *Kostelny* v. *Logan Hydraulics, Inc.*, 38 Ill. App. 2d 326, 187 N. E. 2d 314 (Abstract only). There a salesman sought to recover commission on certain sales. The salesman's employer defended on the ground that the salesman's claim for commissions was contrary to the agreement between the parties. The trial court had entered judgment for the plaintiff on some *equitable* theory (similar to the result reached by majority of the reviewing court herebelow). The Appellate Court not only reversed the judgment entered below for plaintiff, but remanded the case with instructions to enter judgment for the defendant-employer, saying (Case No. 48717, Opinion p. 6):

> "* * * His (the Judge's) attempt to apply 'fireside

justice,' which perhaps was founded on some quantum meruit theory, is not contemplated by the law. *The court must take the contract as it finds it and may neither add new provisions nor delete provisions already there. Neither may a court revise a contract to arrive at a settlement which it deems equitable to the parties involved. The Chicago Title & Trust Co.* v. *Max Robin*, 361 Ill. 261; and *Englestein* v. *Mintz*, 345 Ill. 48." (Explanatory material and emphasis supplied.)

Upon further review of the case here at bar, a similar result should be reached, with judgment being entered in favor of the petitioner, defendant below.

Such manifest departure from settled law, both by the trial court and by the majority of the reviewing court here, is deprivation of property without due process of law. Any such decision eloquently calls for further review by the highest court of the United States, in order that the constitutional guarantees may remain intact, protected from erosion.

At the very least, the majority opinion below was such a gross departure from settled procedure as to require supervision by this Court.

## CONCLUSION.

Wherefore, petitioner respectfully prays that this Honorable Court grant its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, and that upon review the majority opinion below be reversed with directions that the judgment entered in the District Court be set aside and that judgment be entered for petitioner, defendant below, all in accordance with the reasoning expressed by Judge Schnackenberg in the dissenting opinion.

Respectfully submitted,

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# APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 14231 September Term, 1963 April Session, 1964

WALTER J. REES,
*Plaintiff-Appellee,*
*vs.*
BANK BUILDING AND EQUIPMENT CORPORATION OF AMERICA, a Corporation,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 25, 1964

Before DUFFY, SCHNACKENBERG and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* The defendant-appellant, Bank Building and Equipment Corporation of America,[1] prosecutes this appeal from a judgment against it for $39,000.00 entered by the District Court on a jury verdict awarding damages in that amount to Walter J. Rees, plaintiff-appellee. The liability asserted against Bank Building in the plaintiff's action is predicated upon an alleged termination of plaintiff's employment with Bank Building wrongfully, without cause and in bad faith in an attempt to deprive him of commissions which would accrue to him.

[1] Sometimes referred to herein as "Bank Building".

The main issues precipitated by Bank Building's appeal are whether, as a matter of law, the provisions of a compensation agreement relating to plaintiff's employment preclude recovery by plaintiff, and, if not, whether the evidence and the inferences which may reasonably be drawn therefrom, when considered in the light most favorable to the plaintiff, support the jury's verdict. These two issues permeate Bank Building's contentions that the district court erred in failing to grant its motions for a directed verdict, both at the close of plaintiff's evidence and at the close of all the evidence, and erred in the giving and in the refusing to give certain instructions. Appellant also asserts that the court erred in admitting an exhibit in evidence.

The record discloses that Bank Building engages in the business of furnishing architectural and consulting services, of acting as a general contractor, and of acting as a supplier of fixtures and equipment, in connection with the construction or remodeling of the facilities of banks and other financial institutions. It maintains a large staff consisting of executives, sales analysts or salesmen, architects, designers, cost estimators, decorators and others. On February 28, 1956, it employed plaintiff as a sales analyst or salesman-representative to sell its services and negotiate and have executed architectural, building and fixture contracts. The employment was for no fixed duration. A compensation agreement executed by the parties provided for regular semi-monthly payments or advancements of $208.00 to the plaintiff to be charged against commissions earned by him under the terms of a schedule[2] governing commis-

[2] Under the provisions of the commission schedule the plaintiff, as a salesman, was entitled to commission credits computed on the basis of percentages specified for salesmen conditioned in substance, as follows:

(a) when the client approved the preliminary plans, the salesman's percentage on 25% of Bank Building's architectural-consultant fee;

(b) when the client authorized preparation of working

sion rates and conditions. The compensation agreement further provided:

> "Should the employee leave the company voluntarily, or at the request of the company, final accounting and settlement shall be made within 30 days after such separation. The employee shall be paid in full the commission or other compensation due him in accordance with the terms of this agreement for those portions of work authorized at the time of separation as follows:
>
> Commissions on Building and Fixture Contracts at established rates on the original contract and Fixture Extras secured up to the time of separation.
>
> Commission on Architectural contracts at established rates on the actual or estimated fee to be paid by the owner upon completion of the authorized stage of work. (Preliminary, Working Drawing or Final.) No compensation is to be paid on the unauthorized portion of architectural work."

In the summer of 1956 plaintiff represented Bank Building in preliminary consultations and the signing of consultant and architectural agreements in connection with a drive-in facility for the American National Bank of St. Paul, St. Paul, Minnesota. Negotiations and consultations with American continued and were expanded to encompass either the erection of a new bank building or the remodeling of its existing building. In May of 1957, Bank Building in response to an inquiry from Bell Savings & Loan

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drawings, upon client's approval of such drawings, the salesman's percentage on the next 50% of the total architectural-consultant fee;

(c) upon preparation of final plans, and the client's approval thereof, the salesman's percentage on the final 25% of the architectural-consultant fee;

(d) when the building contract was received, signed by the client, the salesman's percentage of Bank Building's total fee as general contractor;

(e) when authorization or contract of client for fixtures or equipment was received, the salesman's percentage of the total price.

Association, Chicago, Illinois, sent plaintiff to interview Bell's officers in connection with a proposed expansion of Bell's facilities. In addition to his other activities in behalf of Bank Building, plaintiff worked continuously and extensively on these two projects for over two years, devoting over 35% of his time to them. They culminated in building contracts involving substantial amounts. The estimated overall cost on the American contract exceeded two million dollars. The evidence warrants a conclusion that prior to plaintiff's discharge each of these clients was fully committed to the projects involved, expected Bank Building to do the work, and that the delays encountered were attributable to the client's consideration of alternative proposals presented, the obtaining of space necessary for the expansion involved, and other factors involving no uncertainty as to the decision to proceed with the project or as to whether Bank Building would be engaged to do the further work in completion of the project.

The plaintiff was discharged effective August 15, 1958. On the American job, the plaintiff received commission credit covering the architectural and building contracts on the drive-in facility, and on the preliminary architectural work for building remodeling. On the Bell job, plaintiff received commission credit on the preliminary architectural work. The $39,000.00 awarded by the jury's verdict, and in the judgment entered on the verdict, does not exceed a salesman's commission, computed according to the governing schedule, on the work authorized and contracts entered into on these two projects subsequent to plaintiff's discharge. Such work included the balance of the architectural work and the building and fixture contracts on the American project, and the balance of the architectural work and the building contract on the Bell project.

Appellant contends that the provisions of the compensation agreement quoted *supra* limit the plaintiff's right to

commission in event of his leaving its employ "at the request of the company" and that he has been fully compensated or credited under the standards expressly set forth in the agreement which limit such commissions to work under contract or client authorization "at the time of separation". Appellant contends, in substance, that the express provisions of the compensation agreement must be literally applied and that, as a matter of law, it is of no consequence whether the discharge of the plaintiff was without cause, in bad faith, and for the purpose of depriving him of the commissions which would accrue on formal authorization of the balance of the work contemplated, with reasonable certainty, on the two projects.

The court, of course, was without power to remake or alter the contract of the parties. We are of the opinion that it did not do so, but in its rulings and instructions merely determined that the contract limitations did not apply to the situation presented by the evidence. And we perceive no error in that determination. Although the contract language evinces a meeting of the minds of the parties as to the commissions to be paid or credited in the event plaintiff voluntarily left the employ of the company or was discharged for cause it can hardly be assumed from the language employed that a bad faith discharge, without cause, and for the purpose of depriving plaintiff of commissions reasonably certain to accrue to him, was within the mutual contemplation of the parties.

The effect of an express provision authorizing a discharge without cause has been recognized by the jurisdiction (Missouri) whose law as to substantive matters it is agreed must be applied in this case. *Croskey* v. *Kroger Co.*, 259 S. W. 2d 408, 412; *Spencer* v. *General Electric Company*, 8 Cir., 243 F. 2d 934. But we are of the view that in the absence of such a provision there is no basis, in the instant case, for rejecting the general principle which

implies a requirement that a principal deal fairly with his agent. Such principle is stated in 17A C. J. S. Contracts § 328, pp. 284-286, as follows:

> "Moreover, in every contract there exists an implied covenant of good faith and fair dealing; and, more specifically, under such rule, the law will imply an agreement to refrain from doing anything which will destroy or injure the other party's right to receive the fruits of the contract."

And, although there are factors which serve to distinguish *Beebe* v. *Columbia Axle Co.*, 117 S. W. 2d 624 and *Glover* v. *Henderson*, 120 Mo. 367, 25 S. W. 175, from the precise situation here involved, these decisions, relied upon by the plaintiff, do represent in effect a recognition and application of the "good faith and fair dealing" principle by the Missouri courts in situations somewhat similar to that here involved albeit the factual situations presented did not admit of relief identical to that granted in the instant action. The rationale of those decisions in our judgment requires application of the "good faith and fair dealing" doctrine here. See also: *Fargo Glass & Paint Co.* v. *Globe American Corporation*, 7 Cir., 161 F. 2d 811.

We conclude that the District Court did not err in the legal criteria it applied in denying appellant's motions for directed verdict and in the giving and refusing of instructions. It is our further conclusion that on the record before us the factual considerations involved in the resolution of the questions as to whether cause existed for plaintiff's discharge, whether at the time of his separation it was reasonably certain that Bank Building would receive the contracts and authorizations for the balance of the work on the American and Bell projects, and whether plaintiff's employment was terminated in bad faith in an attempt to deprive him of commissions to accrue on the remaining work, were all for resolution by the jury. And there is substantial support in the record for the conclu-

sions on these factual issues which are implicit in the jury's verdict. We see no purpose to be gained by detailing that evidence here.

We have considered appellant's contention that the court erred in admitting in evidence, over appellant's objection, a report of appellant's district sales manager dated June 19, 1958, summarizing an interview with Bell's vice-president in which the latter is reported to have expressed Bell's desire that Bank Building do the entire job. The report was admissible on the issue of Bank Building's belief as to whether it was reasonably certain to receive the additional and remaining work on the project albeit it expressed a conclusion of the district sales manager rather than a verbatim recital of the statement made by the Bell executive. Moreover, both the district sales manager and the Bell vice-president testified at the trial as to the conversation involved. Under such circumstances the admission of the exhibit in question cannot be regarded as error requiring a reversal.

The judgment order of the District Court is affirmed.

AFFIRMED.

No. 14231.

SCHNACKENBERG, *Circuit Judge*, dissenting.

It is axiomatic that "hard cases make bad law". *Black's Law Dictionary (3rd Edn.)* p. 876. In the case at bar the district court, in endeavoring to give relief to plaintiff, has probably made a new contract for the parties. Under the contract which really existed between the parties, plaintiff was entitled to commission credits on architectural services which had actually been *authorized* by Bell Savings and Loan Association and American National Bank of St. Paul. However the district court, by a process of interpretation, in effect extended the contractual rights of plaintiff in such a manner as to obliterate the importance of the prerequisite of authorization.